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Aliens' protection against expulsion and prohibition of collective expulsion by the Jurisprudence of the European Court of Human Rights

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1. Opening considerations on ECtHR's approach

Over the course of the last decades, the European Court of Human Right's (ECtHR) jurisprudence has extended the protection of immigrants' rights by means of a flexible interpretation of the European Convention of Human Rights (ECHR). It did so by appealing to the universal dimension of these norms – i.e. referring to any person, even though not directly aimed at regulating the condition of immigrants themselves (1). In particular, the ECtHR has outlined a juridical base to protect irregular immigrants from expulsion at the presence of given circumstances which actually extend the safeguards provided by immigration laws. Even though the ECtHR's jurisprudence follows the international praxis, which acknowledges State's prerogatives to control aliens' admission – and with it the right to reject and expel immigrants – it has nonetheless limited the range of discretion of the High Contracting Parties. This is for instance the case when the return decision threatens the right to life (Article 2), does not guarantee

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(1) See B. NASCIMBENE, *Protocollo 4 – Artt. 3 e 4,* , in *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, eds. S. BARTOLE, B. CONFORTI, L. RAIMONDI Padova, 2001; P. STANCATI, *Le libertà civili del non cittadino: attitudine conformativa della legge, assetti irriducibili di garanzia, peculiarità degli apporti del parametro internazionale*, in *Lo statuto costituzionale del non cittadino – Associazione Italiana dei Costituzionalisti*, Napoli, 2010, 107 ss.; B. RANDAZZO, *Lo straniero nella giurisprudenza della Corte europea dei diritti dell'uomo*, in *www.cortecostituzionale.it (studi e ricerche)*, 2008.

compliance with the prohibition of torture (Article 3), does not secure the right to respect for private and family life (Article 8) or the right to an effective remedy (Article 13) of a third country's citizen (2).

While the recourse to Article 2 of the ECHR didn't produce a significant jurisprudence (3), Article 3, enclosing the prohibition of torture and inhuman or degrading treatment, has often allowed the Strasburg Court to protect the rights of immigrants. In this way, the Courts guarantees compliance with the principle of *non-refoulement,* that is the prohibition of expulsion or extradition towards countries wherein there is a serious risk that a person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment (4).

The *Soering* case (5) is the first example of such jurisprudence, whereby immigrants are provided indirect protection within the ECHR's scope. In this case, the ECtHR found that if there is a real risk for the applicant of being subject to treatments in breach of Article 3, or of other severe violations of fundamental rights in the country of destination, the Member State shall not proceed with expulsion measures. The same principle has also been followed by the Court as far as the expulsion of irregular immigrant is concerned. The *Cruz Varas* case (6), which paved the way for further decisions on the same subject (7), dealt with the irregular entry in Sweden by a Chilean citizen. The applicant was a political opponent of the Pinochet regime. After being arrested and persecuted in his country, he illegally flew to Sweden, where he applied for asylum. Nonetheless, he was denied it and a procedure of expulsion started.

(2) See B. NASCIMBENE, *Protocollo 4 – Artt. 3 e 4,* in S. BARTOLE, B. CONFORTI, L. RAIMONDI, *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2001, p. 891 ss.

(3) Under Article 2, "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law".

(4) The principle of *non-refoulement* is one of the most important guarantees of the immigrants in case of decisions of return adopted by Member States. See B. NASCIMBENE, *Lo straniero nel diritto internazionale*, Milano, 2013; G. D'IGNAZIO, S. GAMBINO, *Immigrazione e diritti fondamentali. Fra costituzioni nazionali, Unione europea e diritto internazionale*, Milano, 2010; F. SCUTO, *I diritti fondamentali della persona quale limite al contrasto dell'immigrazione irregolare*, Milano, 2012; A. HURWITZ, *The collective responsibility of States to protect refugees*, Oxford Monographs in *International Law*, Oxford, 2009.

(5) *ECtHR judgment* 7.7.1989 in the Case of *Soering v. United* Kingdom. The applicant was a German national; he was charged with capital crime and was serving a sentence in the U.K. An order for the applicant's extradition to Virginia in the United States was issued. Therefore he faced a possible death sentence in Virginia and exposure to the death row. The ECHR found a violation of article 3, thereby recognizing the extra-territorial effect of the ECHR. The Court held that Article 3 could not be interpreted as prohibiting, in itself, capital punishment. However, the conditions of execution of the punishment (exposure to "death row" syndrome) would expose the applicant to a real risk of treatment going beyond the threshold set by Article 3.

(6) Case *Cruz Varas and others v. Sweden, ECtHR judgment* 20.3.1991.

(7) See Case *Chahal v. UK, ECtHR judgment 15.11.1996; Case Labari v. Turkey, ECtHR judgment* 11.7.2000; Case *Hilal v. UK*, *ECtHR judgment* 6.3.2001.

Even though the Court, in this specific case, acknowledged that Sweden was not violating Article 3 of the Convention, it has nonetheless found that the prohibition of *refoulement* should be applied also in cases of irregular immigrants' expulsion (8). The rationale underneath this decision was that Member States shall abide to the principle of *non refoulement* even towards irregular immigrants. Following the same line of reasoning, the Court has extended the protection provided by Article 3 also to cases of expulsions of immigrants involved in international terrorism from Italy (9).

The Strasburg Court has then established that the ECHR prevents Member States from expelling an immigrant, even if "irregular", when there is a serious risk that she or he could be subject to inhuman treatments in the country of destination. The Court also specified the conditions under which existence of the aforementioned risk should be assessed. On the one hand, the immigrant has the burden of proving the risk envisaged in case of expulsion. On the other hand, the State has a duty to verify the conditions in the country of destination in order to avoid violation of Article 3 in case of expulsion. The sentence *J.K and others* is a good example of the reasoning described above. An Iraqi family entered in business, in its home-country, with Americans clients. For this reason, from 2004 to 2008, it was the target of severe violence and persecutions by *Al Qaeda*. This included the assassination of one of the daughters, the kidnapping of a son, and several murder attempts on the father. In 2011, Sweden denied the family's request of asylum. Swedish authorities argued that since the family didn't work anymore with American clients, they wouldn't be subjected to further retaliations if repatriated. However, the *Grande Chambre* was of a different advice. In the light of the fact that, in its opinion, there was a credible and serious risk of retaliation, it established that the Country of Sweden didn't do enough to dispel any doubt about the aforementioned risk of future persecutions in case of expulsion (10).

Drawing from this line of reasoning, in the *F.G. case* – which is one of the rare cases in which the protection was granted not only under Article 3 but also under the right to life recognized by Article 2 – the *Grande*

(8) § 70 of the judgment.

(9) See the case *Saadi v. Italy, ECtHR judgment* 28.2.2008; *Ben Salah v. Italy, ECtHR judgment* 24.3.2009 and others judgments of 2009 against Italy under violation of Article 3. The Court underlined that state action relating to expulsion is restrained by the absolute nature of Article 3 and the positive obligation not to send individuals to a state where they are at real risk of prohibited treatment also in the case of terrorism. The absolute nature of the prohibition on torture, inhuman and degrading treatment or punishment "enshrines one of the fundamental values of democratic societies" and must therefore be maintained, even in times of emergency or war. Notwithstanding the fact that states face "immense difficulties" in combating the contemporary international terrorist threat, one's suspected involvement in terrorist activity does not take away from the absolute nature of their rights under Article 3. See S. SILEONI, *La CEDU e l'espulsione di immigrati stranieri: il caso Saadi c. Italia*, in *Quaderni costituzionali,* n. 3, 2009, p. 719 ss..

(10) Case *J.K. and others v. Sweden* , *ECtHR judgment* 23.08. 2016.

Chambre has ruled that if fundamental rights – such as the ones protected by the aforementioned articles – are at risk, while assessing the conditions of the country of destination the Member State has the duty to also take into account the factual elements that are not outlined in the applicant's original request, but that emerge nonetheless from his deposition or documentation. In this specific case then, the ECtHR stated the Member State has a duty to verify whether an applicant's conversion to Christianity implies a risk for his life, dignity or health in case of expulsion towards his home-country – in this case Iran (11). Even more so, this reasoning applies to the cases whereby said risk is easily verifiable through information that is public or otherwise easily accessible for the State's organs.

The notion of alien's protection from conducts violating Article 3 has been extended to cover not only violations committed by the State's public authorities, but also those perpetrated by political factions (12) and individuals (13). Yet, it has also been stated that the failure to enforce public order is not a sufficient condition to prove a serious risk of violations of protection from torture (14), and other limits have been set in order to benefit from this extension of protection (15). Nonetheless, the Court found that even if specific situations of humanitarian emergency existing in a given country do not imply an automatic violation of Article 3, they could justify its *prima facie* violation. In the *Sufi and Elmi* case, the Court held that the high level of violence and systematic violation of human rights in Mogadiscio, the capital of Somalia, constituted a serious and immediate risk of treatment contrary Article 3 for whoever happened to be in the city (16). Such conditions of danger shall be always effectively verified, since their evolution, even in a relatively short span of time, might be evidently the basis for a different decision. As a matter of fact, in the case *K.A.B.* the Court has ruled that the conditions of Mogadiscio, even if still troubling, considerably improved with respect to its previous decisions. Under these new premises, expulsions toward Mogadiscio were deemed to be compatible,

(11) Case *F.G. v. Sweden*, *ECtHR judgment* 23.03. 2016.
(12) Case *Ahmed v. Austria, ECtHR judgment* 17.12.1996.
(13) Case *H.L.R. v. France*, *ECtHR judgment* 29,04.1997. In that case the Court established the principle of protection for private individuals but didn't find violations of Article 3. In a most recent case the Court stated that there would be violation of Article 3 of the Convention (see Case *N. v. Finland*, *ECtHR judgment* 26.7.2005).
(14) On this point, see Case *Vilvaraja and others v. United Kingdom*, *ECtHR judgment* 30.10.1991.
(15) On this point, see A. ESPOSITO, Article 3, in *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali,* eds. S. BARTOLE, B. CONFORTI, L. RAIMONDI, 68-69. In the Case H.L.R. v. France the Court has ruled that the protection against action of private individuals must be guaranteed under two conditions that must be demonstrated: 1) the expulsion of an alien by a Contracting State may give rise to an issue under Article 3), where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country; 2) Public local Authorities are incapable of protecting them from attacks by such persons.
(16) See Case Sufi and *Elmi v. United Kingdom*, *ECtHR judgment* 28.11.2011

at least in theory, with the Convention, provided that the danger is thoroughly examined by the Member State on a case by case basis (17).

2. The extension of the guarantees beyond the prohibition of refoulement

Interestingly, by intervening in cases of expulsion this jurisprudence has progressively extended the guarantees for immigrants also beyond the prohibition of *refoulement.*

As a matter of fact, the ECtHR, which remains entrenched to the field of aliens' expulsion, has strengthen the principle of *non-refoulement* by establishing a series of procedural guarantees in order to protect the immigrant from a possible denial of the right to an effective remedy provided by Article 13 of the Convention. In a 2002 pronouncement, the Court stated that an immigrant's appeal against an expulsion decision cannot be regarded as "effective" if the judge didn't reach a decision before the expulsion took place (18). In the same judgment, the Court also intervened on the matter of the amount of time at disposal for irregular immigrants to present an asylum application before the expulsion decision is issued, and found that an extremely short deadline (five days in the specific case) amounts to a violation of Article 13. The importance of these provisions is not to be overlooked. As a matter of fact, they tackle come vital issues of the European discipline on expulsions, like the deadline for issuing an appeal and the temporary suspension of expulsion decisions.

A further procedural safeguard for immigrants has been provided by another judgment of the Court in 2005 (19). Citing Article 6 of the Convention, which recognizes the right to a fair trial (20), the ECtHR condemned Italy for failing to provide a translation of the proceedings at matter to a Tunisian citizen. This omission prevented him from participating in a trial in which he was involved, notwithstanding his expressed will to intervene.

On this point, it has also to be noted that the ECHR noticeably limits the irregular immigrant's right to a fair trial when a decision of expulsion is issued. As a matter of fact, protocol number 7 of the Convention outlines

(17) Case *K.A.B. v. Sweden, ECtHR judgment* 05.09.2013.

(18) Case *Conka v. Belgium, ECtHR judgment* 05.05.2002. The Court considered that «the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible (see, *mutatis mutandis*, *Jabari*, cited above, § 50). Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision» (§ 79).

(19) See Case *Hermi v. Italy, ECtHR judgment* 28.06.2005.

(20) Article 6 of ECHR provided for the right to a fair trial..

a number of procedural safeguards in cases of expulsion only for legally resident immigrants (21). Therefore, the ECtHR jurisprudence normally excludes procedural safeguards for irregular immigrants. As testified by some 2009 decisions (22), despite the fact that Article 6 of the Convention applies to every person, the Court found that the provisions of said article cannot be applied to the irregular immigrant in cases of expulsion.
With regard to the cases of expulsion of third-country nationals, the ECtHR has also intervened in order to guarantee the right to health of aliens being expelled. The Court ruled that Member States shall always verify the health conditions of aliens to be returned because returns in cases of diseases that cannot be properly recovered in the country of destination amount to violation of the ban of torture sanctioned in Article 3. Nonetheless, in the ECtHR's jurisprudence, the prohibition of expulsion due to healthcare concerns is limited to exceptional cases, namely to particularly serious diseases that demand humanitarian considerations. Under this perspective, in two cases the Court prevented Member States to return aliens affected from HIV (23). The reasoning of the Court was that the protection of fundamental rights shall prevail on other interests by virtue of which the provision of expulsion is issued, in the event of an immediate risk of death and in other very exceptional cases. In a recent decision, the Court has clarified that these "other very exceptional cases" should be understood as referring to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the impossibility to access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health, resulting in severe suffering or a significant reduction in life expectancy (24). In such cases, it is the applicants' responsibility to disclose evidence capable of demonstrating that there are

(21) See Article 1 of the Protocol n. 7, "Procedural safeguards relating to expulsion of aliens": an alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: (a) to submit reasons against his expulsion, (b) to have his case reviewed, and (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority. An alien may be expelled before the exercise of his rights under paragraph 1.(a), (b) and (c) of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.
(22) See Case *Ben Salah v. Italy, ECtHR judgment* 24.03.2009; case *Sellem v. Italy, ECtHR judgment* 5.5.2009; case *Maaouia v. France, ECtHR judgment* 5.10.2000.
(23) See Case *D. v.* United Kingdom, *ECtHR judgment* 2.5.1997, § 51-53; Case *B.B. v. France*, *ECtHR judgment* 28.06.2005 in which an alien from Congo applied for Asylum in France. In that specific case, the Court didn't find any violation of article 3: «it appears, however, that as regards Article 3 of the Convention the measure reflects, through its continuity and duration, the French authorities' intention to allow Mr. B.B. to receive the treatment his present condition requires and to guarantee him, for the time being, the right to remain in France. In that connection, it should be noted that in their memorial of 16 July 1998 the Government indicated that they "[had] not shown any intention of actually deporting Mr. B.B.» (par. 37).See also Case *N. v. United Kingdom, ECtHR judgment* 27.5.2008.
(24) See case *Paposhvili v. Belgium, ECtHR judgment* 13.12.2016.

substantial grounds for believing that, if the measure of expulsion were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3. Where such evidence exists, it is the expelling States' responsibility, in the context of domestic procedures, to dispel any doubts raised by it. The risk that is alleged must be subjected to close scrutiny and shall take into account not only the availability of medical treatments in the destination country, but also whether the alien would actually have access to this specific treatments and facilities in the State of destination.

With regard to Article 5 of the ECHR, which allows restrictions to the aliens' right to liberty when it comes to prevent them from illegally entering a Member State, or in cases in which they are subjected to procedures of expulsion or extradition (25), the Court has also ruled on measures that limit immigrants' personal liberty (26). In this regard, it is worth recalling the sentence *Amuur* (27). The case was about Somali citizens that, without a residency permit, had been stopped in the international transit area of Paris-Orly airport and detained there for twenty days. As stated by the Court, the detention of aliens' should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty – inevitable when it comes to organizing the practical details of the alien's repatriation or, if he has requested asylum, while his application to enter the territory for that purpose is considered – into an effective deprivation of liberty. It must be also stressed that the measure is not only applicable to those who have committed criminal offences but also to aliens who, often fearing for their lives, have fled from their own country (28). Remembering that the extension of the detention period needs to be approve by a decision of the judiciary, the Court has sanctioned that in that case French provisions didn't sufficiently guarantee the right to liberty recognized by the ECHR (29). With a 2004 decision upon an alien's treatment inside an Italian "Temporary Detention Center", the ECtHR, after citing its own jurisprudence on matters of detection (see the *Amuur* case), stated that Article 5 applies also to cases of aliens' detention in such "Centers" (30).

On this point the ECtHR has opted for the protection of some basic guarantees for the irregular immigrant, subject to a return decision, whose liberty is limited. It has then been stated that the detention should have a reasonable duration and should not turn into a restriction of personal liberty, with the exception of the

(25) Article 5, c. 1, lett. *f)* of the Convention.
(26) On the jurisprudence of the Court on Article 5, lett. *f)* della Convenzione, see M. PISANI, *Article5,* in *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, eds. S. BARTOLE, B. CONFORTI, L. RAIMONDI, 127 ss.
(27) Case *Amuur v. France*, *ECtHR judgment* 25.6.1996
(28) In relation of National legal orders that don't provide the crime of illegal entry of aliens.
(29) Article 5.1 ECHR.
(30) Case *Zaciri v. Italy, ECtHR judgment* 13.5.2004.

cases specifically outlined by Article 5. Hence, the modality enacted by state authorities to limit aliens' personal liberty itself – which could be legitimate in light of Article 5 – might nonetheless amount to a violation of this Article (31). With the 2008 *Saadi* pronouncement (32), the ECtHR has specified the criteria according to which a restriction of an irregular immigrant's personal liberty is not to be considered a violation of the Convention. Among these, it is worth mentioning the principle of proportionality – i.e. the need to strike a balance between the importance of securing the immediate fulfillment of the obligation in question in a democratic society, and the importance of the right to liberty – with regard to the duration of the detention and the need that the conditions of detention should be appropriate thus allowing a decent stay (33).

Moving from Article 5, ECtHR's jurisprudence has then introduced some criteria directed at limiting the discretion of national authorities in favor of the alien's basic rights and liberties, even when he or her is subjected to an expulsion decision. In this sense, Article 5 has allowed the Court, with a 2011 decision, to declare the illegality of a custody in an Italian detention center. A Bosnian citizen irregularly present in Italy gave birth to a baby, which died shortly after, and was then taken to a detention center waiting for the enactment of the expulsion decision. Since Italian law prohibits expulsion for the six months following the childbirth (34), the Court has found the expulsion decision illegal and the Bosnian citizen was released.

3. The prohibition of collective expulsions of aliens

With its decisions The Strasbourg Court has also intervened on the aliens' right to not undergo collective expulsions. Differently from the cases examined thus far, in this case the protection of aliens' rights laid down by the Court is not indirect but rather directly provided by Article 4 of the Protocol 4 of the Convention, that provides the prohibition of collective expulsion of aliens (35). This Article openly rules the aforementioned prohibition in reason of Member States' duty to take decisions about aliens' expulsions on

(31) See, on this point, the recalled Case *Conka v. Belgium, ECtHR judgment* 05.05.2002.
(32) Case *Saadi v. United Kingdom, ECtHR judgment 29.01.2008*.
(33) In *Saadi*, The Court fixed some criteria about detention: "to avoid being branded as arbitrary, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country" (see *Amuur*, cited above, § 43); and the length of the detention should not exceed that reasonably required for the purpose pursued" (*Saadi*, §§ 70-90). See also *A. and others v. United Kingdom, ECtHR judgment* 19.2.2009.
(34) Article 19, Legislative Decree n. 286/1998 - Italian Immigration Act.
(35) The Protocol has been signed in Strasburg on September 16th 1963.

a case-by-case basis. Since its first decision (36) on an expulsion decided by the Danish Government for 199 South Vietnamese children, the ECtHR has excluded the occurrence of collective expulsion if such measure is taken after, and on the basis of, a reasonable and objective examination of the particular case of each individual belonging to the group. In the case in point, the Court has eventually declared the claim of a violation of Protocol 4 inadmissible, and this interpretation was later confirmed by further decisions (37). To be true, applications on the basis of alleged violations of the prohibition of collective expulsions were rejected in many occasions. An exception to this trend can nonetheless be found in the aforementioned 2002 ECtHR's decision (*Conka v. Belgium*). In that occasion the Court ascertained the occurrence of a collective expulsion due to the fact that little attention had been paid to the individual cases while formulating the expulsion decision of the group (38). A second exception occurred in the 2014 *Georgia* case, which involved a decision of expulsion directed towards several thousands Georgian citizens residing (both lawfully and irregularly) in Russia. Even though each case proved to have been separately considered by the judiciary, the Court nonetheless found that these expulsion decisions amounted to a violation of Protocol 4 since the high number of decisions, combined with the little span of time whereby these were taken, actually prevented the competent authority from conducting a reasonable and objective examination of each individual case. (39). In the same year, the Court found a further violation of Article 4 of Protocol 4 by Italy – along with a violation of Article 3 and Article 13 of the Convention by both Italy and Greece. In the case *Sharifi and others*, four immigrants had been intercepted by the Italian border police while disembarking from a ship coming from Greece and were immediately returned there. It must be also noted that this practice of "summary" returns was in clear violation of the 1999 bilateral agreements between Italy and Greece but nonetheless seemed to have turned into a common practice in time. For the Court, the lack of a communication of their rights to the aliens, especially the right to apply for asylum – in a way that allows an effective access to said rights (e.g. by recurring to a translator), combined with the violation of the bilateral agreements, amounted to a violation of both the right to a fair trial and the rights protected by Article 3 of the Convention. As far as Italy was concerned, it was acknowledged the violation of article 4 of Protocol 4 inasmuch as the border authorities enacted an indiscriminate expulsion of the four applicants (40).

(36) Case *Becker v. Denmark, ECtHR judgment* 3.10.1975.
(37) See case *Alikabas and others v. Netherland, ECtHR judgment* 16.12.1988; case *A. v. Netherland ECtHR judgment* 6.5.1986; case *Andric v. Sweden*, *ECtHR judgment* 23.2.1999; case *Sultani v. France ECtHR judgment* 20.9.2007.
(38) See again *Conka*, *ECtHR judgment* 5.5.2002,.
(39) Case *Georgia v. Russia*, *ECtHR judgment* 3.07.2014.
(40) Case *Sharifi and others v. Italy, ECtHR judgment* 21.10.2014.

As far as the prohibition of collective expulsion is concerned, the most important case recently adjudicated by the Court is, undoubtedly, that of *Khlaifia and others*. The framework of the incident was that of the "refugee crisis", which is the massive increase in the migratory flows toward Europe – and particularly Italy - as consequence of the so-called Arab Spring. In this case, three Tunisian citizens illegally arrived in Lampedusa and were thereafter detained in two ships at the port of Palermo, and were later expelled according to the simplified procedure provided by a 2011 bilateral agreement between Italy and Tunisia. In this occasion, the *Grand Chambre* intervened by clarifying the effective scope of Article 4 of Protocol 4. According to its decision, Article 4 of Protocol 4 does not provide to each alien the right to an individual interview. Rather, the content of the aforementioned rule is said to be respected when each alien has effectively had a real possibility to provide arguments against its expulsion, and these arguments are effectively considered by State authorities (41). In the case in point, the applicants had twice been subjected to the identification procedure, their nationality was ascertained and they had been provided the possibility to present their arguments in order to clarify their individual situation. In the same line, the Court has clarified that Article 13 of the Convention, taken together with Article 4 of Protocol 4, does not impose an absolute obligation on a State to guarantee an automatically suspensive remedy to the expulsion decision. For the Court, when an alien alleges that the expulsion procedure was "collective" in nature, without claiming at the same time that it had exposed him or her to a risk of irreversible harm in the form of a violation of Articles 2 or 3 of the Convention, his or her rights are guaranteed if him or her is provided an effective possibility of challenging the expulsion decision by having a sufficiently thorough examination of his or her complaints carried out by an independent and impartial domestic forum. This decision could betray the Court's concerns for the situation of emergency represented by an unprecedented boost in immigration flows that some European Countries were facing at the time of its decision. In fact, the ECtHR has justified a narrower interpretation of aliens' rights (particularly against expulsion decisions) to accommodate the States' needs to control the migration flows by means of an elastic (and in some ways political) use of the doctrine of the margin of appreciation which has allowed to take into account the reasons of efficiency that the aforementioned situation required to be adequately addressed.

(41) *Khlaifia and others v. Italy, ECtHR judgment* 15.12.2016.

4. The importance of the 2012 Hirsi Jamaa judgment

As far the jurisprudence of the Court on the subject of aliens' expulsion is concerned, this 2012 decision is of particular relevance. Here, the Court has stressed the importance of compliance with the principle of *non-refoulement* in the context of operations carried out on the high sea by signatory States. In the case in point, the Court has condemned Italy for intercepting irregular immigrants on high sea and transferring them to Libya, since this practice violates Articles 3, 13 of the Convention and 4 of Protocol 4. This pronouncement can be regarded as the *fil rouge* of the ECtHR's jurisprudence on the protection of irregular immigrants' rights inasmuch as it refers to the prohibition of torture or inhuman and degrading treatment - out of which, as previously stated, stems the principle of *non refoulement* - to the right to an effective remedy and to the prohibition of collective expulsions of aliens. At the same time, this unprecedented judgment paved the way for future interventions by the ECtHR aimed at a broader protection of irregular aliens' rights and guarantees. For these reasons, the UNHCR has qualified this pronouncement as "historic".

As already mentioned, with the *Hirsi Jamaa judgment* of the 23th February 2012 (42), the Court has condemned Italy for the group expulsion towards Libya of Somali and Eritrean citizens occurred in May 2009 (43).

Firstly, in this case the Court has recognized a violation of Article 3 of the ECHR, which prohibits inhuman or degrading treatments. In line with its jurisprudence that connects the principle of *non refoulement* to Article 3, while adjudicating on this point the Court had to ascertain the conditions of the aliens' country of provenience as well as those of the country of destination of the transfers operated by Italy - namely Somalia, Eritrea and Libya. By so doing, the ECtHR has established that the transfers towards Libya were illegitimate, and amounted to a twofold violation of Article 3. First, the Libyan authorities failed to provide Italy with sufficient guarantees in relation to the effective protection of refugees. Second, the transfer of the applicants to Libya exposed them to the risk of arbitrary repatriation – i.e. towards their home countries, in which the general situation similarly posed serious and widespread problems of insecurity – by Libyan State authorities. On the one hand, neither Somalia nor Eritrea had ratified the Geneva Convention on Refugees Status and individuals forcibly repatriated to Eritrea faced the serious risk of being tortured and detained in inhuman conditions merely for having left the country irregularly. On the other hand, a 2010 report drafted by the

(42) *Case of Hirsi Jamaa and others v. Italy*.

(43)The Applicants were 11 Somali and Eritrean migrants, part of a group of about two hundred individuals, who left Libya in 2009 aboard three vessels with the aim of reaching the Italian coast. On 6 May 2009, when the vessels were within the Maltese Search and Rescue Region of responsibility, they were intercepted by ships from the Italian Revenue Police and the Coastguard. The occupants of the intercepted vessels were transferred onto Italian military ships and returned to Tripoli.

Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, revealed a systematic violation of irregular aliens' guarantees and rights in Libya (44) – among which the forced returns of irregular migrants, including asylum-seekers and refugees, to high-risk countries.

In addition, for the very first time in its jurisprudence, the Court has also adjudicated on the prohibition of collective expulsions of aliens carried out outside of the national territory of the signatory State involved (45). The rationale provided by the Court for this intervention is that the removal of aliens carried out in the context of interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction within the meaning of Article 1 of the Convention, which engages the responsibility of the State in question under Article 4 of Protocol 4. Therefore, the transfer of the applicants to Libya – carried out without any form of examination of each applicant's individual situation and in the absence of interpreters or legal advisers on board – was deemed to instantiate a case of collective expulsion and, hence, a violation of Article 4 of Protocol 4. This acknowledgment is also particularly relevant due to the fact that up to that moment the Court had recognized such violation in only one occasion (46).

To conclude, the Court has also adjudicated on the alleged violations of Article 13 of the ECHR concerning the right to an effective remedy. For the Court, these practices of aliens' expulsion violated Article 13 of the Convention, if said article is read in conjunction with Article 4 of Protocol 4 and with the principle of *non refoulement*. As a matter of fact, the applicants were deprived of any remedy which would have enabled them to lodge their complaints under Article 3 of the Convention and Article 4 of Protocol No. 4 with a competent authority and to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced, nor had the opportunity (both factual and legal) of applying before the Italian criminal courts upon their arrival in Libya.

The reasons why this sentence has rightly been considered "historical" are manifold. First, the judge has downplayed the principle of territoriality in favor of aliens' fundamental rights. As already seen, the Court has introduced in its jurisprudence the principle according to which the Contracting States shall abide by the prohibition of *refoulement* and collective expulsions in the exercise of their jurisdiction regardless of where this exercise takes place. In substance, the Court has introduced extraterritorial guarantees that do not allow for

(44) Report of 28th april 2010.
(45) Article 4 of Protocol n. 4 of the ECHR.
(46) See again *Conka v. Belgium*.

"protection-less zones". Not even in high sea. Furthermore, the Court has provided for a broad interpretation of the ECHR in that the definition of "collective expulsions" is also extended to operations resulting in the transfer of aliens. As emerges from the Court's assessment, this choice was not obvious. Indeed, a narrower interpretation of the norms there considered would have limited the prohibition of collective expulsions only to cases of expulsion or transfer carried out by a Member State towards aliens irregularly present of the territory of the aforementioned Member State, thus rendering it inapplicable to cases of interception of migrants on the high seas and their removal to countries of transit or origin.

The ECtHR's intervention has therefore considerably increased the safeguards for irregular immigrants subjected to *refoulement* decisions by entrusting them further guarantees that Signatory States shall now take into account when enacting *refoulement* measures of aliens. Thanks to this judgment then, the high sea interception and removal of aliens is no more a viable option to control irregular migration. Hence, new and other means need to be worked out. In so doing, a balance is to be struck between the Signatory States's need to cope with the continued intensification of the migratory flows and the safeguard of aliens. This new course, which has no shortcuts, shall not but pass through a greater cooperation at the European level based on a fairer sharing of responsibilities among the Member States.

5. The ECtHR's pronouncement upon the "Dublin System" on expulsions of asylum seekers

It is known that the EU law, in the form of the Dublin regulation, which establishes the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, has created a net imbalance among EU States in that a vast majority of asylum applications occurring within EU boundaries is eventually examined by only a few Member States. This asymmetry has then generated considerable pressure upon the asylum systems of EU countries looking out onto the Mediterranean Sea, namely Italy and Greece. As consequence, some national asylum systems, such as the Greek one, collapsed, and this led to an overall deterioration in the protection of basic rights in the European space. Despite the clear inadequacy of Dublin System's mechanisms to develop a common European asylum system and a common policy on asylum, immigration and external border control, based on solidarity and fair sharing of responsibilities between Member States - as provided by the Lisbon treaty itself (see Articles 67 and 80 of the TFEU) - national egoisms effectively prevailed for years. In the aphasia of the European legislator, the

first attempts at redefining this corpus of norms came from the ECtHR and from the Court of Justice of the European Union (CJEU).

Indeed, an extensive jurisprudence, particularly of the ECtHR, has put under question the Dublin System through judgments that found that some transfer decisions of asylum seekers taken on the basis of the Dublin regulation's norm as illegitimate were illegal: providing that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection (47) (Article 13). In point of fact, two 2011 judgments are worth recalling. In both cases, the ECtHR and the CJEU found transfer decisions of asylum seekers from the United Kingdom (UK) and Belgium towards Greece to be illegitimate: the transfers were based on the argument that Greece was the European country where the asylum seekers entered first (48). Drawing from the principle of solidarity and fair sharing of responsibility, both the ECtHr and CJEU have established that Member States shall not transfer asylum seekers towards other Member States – even if the transfer is formally in compliance with Dublin II – as they cannot ignore the systemic shortcomings in the asylum procedures as a consequence of unparalleled migratory flows that, by provoking a drop in the standards of asylum seekers' protection, may expose them to inhuman or degrading treatment, as the situation in Greece instantiates.

As mentioned above, building on an already consolidated jurisprudence (49), the ECtHR has repeatedly condemned aliens' transfers between Member States. With regard to Italy, this has also entailed the

[47] See article 13 of the REGULATION (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

[48] Court of Justice of the European Union, 21.12.2011, C-411/10 and C-493/10. *ECtHR judgment* 21.01.2011, case *M.S.S. v. Belgium and Greece M.S.S. v. Belgium and Greece* The facts of the case *M.S.S.* concerned an Afghan asylum seeker who fled Kabul in 2008, entered the European Union through Greece and travelled on to Belgium where he applied for asylum. According to the Dublin rules, Greece was held to be the responsible Member State for the examination of his asylum application. Therefore the Belgian authorities transferred him there in June 2009 where he faced detention in insalubrious conditions before living on the streets without any material support. The Court found a violation of Article 3 by Belgium for exposing the asylum seeker to the risks arising from the deficiencies in the asylum procedure in Greece.

[49] There is a large number of "Dublin Cases" in the jurisprudence of the ECtHR starting from 2000. See case *T.I. v. the United Kingdom*, *ECtHR judgment* 07.03.2000; case *K.R.S. v. the United Kingdom*, *ECtHR judgment* 02.12.2008; case *M.S.S. v. Belgium and Greece*, *ECtHR judgment* 21.01.2011; case *Mohammed Hussein v. the Netherlands and Italy*, *ECtHR judgment* 02.04.2013; case *Halimi v. Austria and Italy*, *ECtHR judgment* 18.06.2013; case *Abubeker v. Austria and Italy*, *ECtHR judgment* 18.06.2013; case *Mohammed v. Austria*, *ECtHR judgment* 06.06.2013; case Sharifi v. Austria, *ECtHR judgment* 5.12.2013; case *Mohammadi v. Austria*, *ECtHR judgment* 03.07.2014; case *Sharifi and Others v. Italy and Greece*, *ECtHR judgment* 21.10.2014; case *Tarakhel v. Switzerland*, *ECtHR judgment* 4.11.2014; case *A.M.E. v. the Netherlands*, *ECtHR judgment* 13.01.2015; case *A.S. v. Switzerland*, *ECtHR judgment* 30.06.2015.

prohibition of immigrants' transfer from the Adriatic ports to Greece based on a 2004 bilateral readmission agreement between the two countries. With the *Sharifi* judgment of 2014 (50), the Court has condemned Italy due to the fact that the aforementioned transfers, which were automatically enacted, hence preventing aliens the access to asylum procedure at the port of Ancona, subjected potential asylum seekers to an effective risk in view of the apparent and serious inefficiencies of the Greek asylum system.

6. Concluding remarks

Even though the ECHR contains some provisions which narrow the guarantees of irregular immigrants subjected to an expulsion decision (51), the ECtHR's evolving jurisprudence has nevertheless provided for an essential level of protection in those cases. The activity of the Court of Strasbourg deserves to be particularly appreciated inasmuch as the Convention does not provide a significant and explicit protection system for aliens. This jurisprudence becomes particularly relevant with reference to the broad scope that it attributes to Article 3 on the prohibition of torture, which translates into an increase in the guarantees for immigrants subjected to a decision of expulsion. From the scrutiny of ECtHR's jurisprudence, the Court's commitment to ensuring a minimum level of protection also to irregular immigrants subjected to expulsion decision clearly emerges. Beyond the merits examined thus far, some aspects are worth noticing in conclusion of this essay.

First, over these years this jurisprudence has enlighten Member States' shortcomings in their, albeit legitimate, action of border control and contrast of irregular immigration. In this sense, the Court has established an essential level of aliens' protection, also in cases of expulsion, by basing it on the rights provided by the ECHR.

Second, in times characterized by policies fighting irregular immigration both at the national and at the EU level, the ECtHR's jurisprudence –in some cases jointly with that of national Constitutional Courts (52) – has had a prominent role in re-striking a balance between Member States and EU's need to control migratory flows and contrast illegal immigration and the need to guarantee the respect of fundamental human rights.

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[50] Case *Sharifi and Others v. Italy and Greece*, *ECtHR judgment* 21.10.2014. The Court found a violation of article 3 and article 4 of Protocol n. 4 of the *ECHR*.

([51]) See the above mentioned article 5.1, lett. *f*) and article 1, Protocol n. 7 of the *ECHR*. The first permits limitasions of right to liberty and detension of an alien to prevent his effecting an unauthorised entry into the country. The second article provides some procedural safeguards relating to expulsion of aliens lawfully resident.

[52] For the case of Italy, see F. SCUTO, *I diritti fondamentali della persona quale limite al contrasto dell'immigrazione irregolare*, Milano, 2012.

As far as this aspect is concerned, the ECtHR's intervention against policies of collective expulsions and high sea *refoulement* – which represented extremely problematic tools of intervention against irregular immigration in terms of protection of fundamental rights – has been particularly prominent.

Third, the more recent jurisprudence of the Court might provide a basis for a rational approach to the refugees crisis of our time. On the one hand, the acknowledgement of the problems that Member States are facing in the management of migratory flows (see the *Sharifi* case). On the other hand, the effort – together with the CJEU – at enacting the principles of solidarity and fair sharing of responsibilities among the Member States provided by Article 67 and 80 of the TFEU. These two might become the "pillars" of a new migration policy that is more rational v*is-à-vis* the current situation, as well as in full compliance with aliens' rights.